No. 14-86

In the

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE UMME-HANI KHAN IN SUPPORT OF PETITIONER

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December 9, 2014

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Umme-Hani Khan is an observant Muslim. As was the case with Samantha Elauf, Abercrombie & Fitch ("Abercrombie") discriminated against Ms. Khan and denied her equal employment opportunity because she wore a hijab.[2]

Ms. Khan believes Islam requires her, in the interest of personal modesty, to wear a hijab when she is in public or in the presence of men who are not immediate family members. In October 2009, when she was nineteen, Ms. Khan was hired to work at Abercrombie's "Hollister"-branded store in San Mateo, California. Abercrombie interviewed Ms. Khan while she was wearing her hijab, and during her employment over the following four months, Ms. Khan was permitted to wear her hijab at all times

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[1] No person other than the *amicus curiae* or her counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent have been filed with, or will be sent to, the Clerk.

[2] "Hijab is an Arabic word meaning barrier or partition." BBC, *Hijab*, Religions - Islam: Hijab, http://www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml (last updated Sep. 3, 2009). "It is the principle of modesty and includes behaviour as well as dress for both males and females. The most visible form of hijab is the head covering that many Muslim women wear." *Id.*

while performing her work duties. Ms. Khan's supervisors saw her as an excellent employee.

In February 2010, a visiting Abercrombie district manager observed Ms. Khan wearing her hijab while she worked. He believed that her hijab violated the company's "Look Policy"—Abercrombie's dress and grooming rules regulating its employees' appearance and the clothing they must wear at work. The Look Policy, among other things, prohibited employees from wearing "headwear." Abercrombie's corporate human resources office thereupon asked Ms. Khan to take off her hijab while she worked. When Ms. Khan responded that her religion did not permit her to do so, Abercrombie suspended her without pay. About two weeks later, Abercrombie called Ms. Khan back and asked her again to remove the headscarf. After Ms. Khan stated once more that she was required by her religion to wear her hijab and that she could not remove it at work, Abercrombie fired her. During her four months of employment, Abercrombie had not received a single complaint or negative comment from anyone regarding Ms. Khan or her presence in the store. Ms. Khan's religiously-based refusal to remove her hijab was the sole reason for her suspension and termination.

Because of these events, Ms. Khan suffered both emotional and dignitary harms. When Abercrombie suspended her, Ms. Khan left the Hollister store in tears, humiliated and not understanding why she was being told that she

would have a renounce a fundamental aspect of her identity in order to keep her job. When Abercrombie terminated her, Abercrombie in effect signaled that Ms. Khan did not fit the company's "All-American" image, and that she was less worthy than her peers, despite her excellent record of employment. The entire experience, regrettably, caused Ms. Khan to question whether she would ever be accepted as an American.[3]

In September 2013, the United States District Court for the Northern District of California determined that Abercrombie had refused to reasonably accommodate Ms. Khan's sincerely-held religious beliefs in violation of Title VII. Finding that Abercrombie could provide no business justification for its insistence that Ms. Khan remove her hijab, the district court entered summary judgment as to liability in her favor. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 965 (N.D. Cal. 2013).

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[3] Although Hani describes herself as a "typical American girl," after she was asked to remove the scarf for a second time by Abercrombie, she cried because she "never had a negative experience with [her] hijab before, even after 9/11." Hani Khan, *Hani Khan, in* Patriot Acts: Narratives of Post-9/11 Injustice 165, 167 (Alia Malek ed., 2011). After press releases were sent out about her Equal Employment Opportunity Commission complaint, she received multiple death threats, including one stating that "someone should behead [her] wrap [her] in a pig carcass and bury it in a mosque." *Id.* at 168.

Because of her personal experiences confronting discrimination on account of her hijab, and her own struggle to vindicate her civil right to observe her religion in the workplace, Ms. Khan has an interest in the outcome of the within matter. She seeks leave to file this brief in the hope this Court will act to ensure that others like herself will not be compelled, as she was, to choose between observing her faith and earning a paycheck.

SUMMARY OF ARGUMENT

Discrimination, like that suffered by Samantha Elauf and Hani Khan, poses a real and significant harm to the people discriminated against and to our society as a whole. People who are subjected to bias on account of their protected status often feel humiliated. As a result, they suffer higher levels of anxiety and depression, and decreased self-esteem and overall psychological well-being. At the same time, discrimination results in decreased job satisfaction and frequent job turnover—both of which are economically costly to society. Considering the increased likelihood that Muslims are viewed negatively by the public and face discrimination by employers today, the Court should carefully reconsider the prudence of placing the burden of requesting a religious accommodation on individual applicants in the manner that Abercrombie urges upon this Court.

ARGUMENT

Americans view Muslims more negatively than other religious groups. Pew Research Center, *How Americans Feel About Religious Groups* (July 6, 2014), http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf (last visited Dec. 3, 2014) (finding that, on a "feeling thermometer" from 0 to 100, with 0 degrees meaning the participant felt as cold and negative as possible and 100 degrees meaning the participant felt as warm and positive as possible, "[f]ully 41% of the public rates Muslims in the coldest part of the thermometer (33 or below)"); Arab American Institute, *American Attitudes Toward Arabs and Muslims: 2014* (2014), *available at* http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf (finding that, among the major religions in the United States, the public had the fewest favorable opinions and most unfavorable opinions about Arabs and Muslims). In fact, the Arab American Institute observed that, since it first began polling on American attitudes toward Arabs and Muslims in 2010, there has been continued erosion in the favorable ratings given to both Arabs and Muslims. Arab American Institute, *supra*, at 3 (finding that "[f]avorable attitudes have continued to decline—from 43% in 2010 to 32% in 2014 for Arabs; and from 35% in 2010 to 27% in 2014 for Muslims.").

Generally, this hostility turns at best into neutrality when the person polled personally knows

a Muslim. Pew Research Center, *supra*, at 10 ("Muslims get a neutral rating (49 on average) from those who know a Muslim, and a 'cooler' rating (35) from those who do not know a Muslim."). *Cf.* Arab American Institute, *supra*, at 5 ("Those who do not know an Arab or Muslim are more likely to view the groups unfavorably, in both instances and favorable attitudes nearly double when the person personally knows an Arab or Muslim."). In other cases, however, these attitudes have hardened into overt Islamophobia, which some in our nation have sought to institutionalize. As of May 2013, lawmakers in 32 states have introduced and debated bills "whose goal is the demonization of the Islamic faith." Fazia Patel et al., *Foreign Law Bans* (May 23, 2013), https://www.americanprogress.org/issues/security/report/2013/05/16/63540/foreign-law-bans/. In 2013, two of these bills, in Oklahoma and North Carolina, both banning the use of "foreign law," i.e., Islamic law or Sharia law in state courts, have been enacted into law.[4] *Id.*

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[4] "These laws, which have passed in [eight] states, are the brainchild of anti-Muslim activists bent on spreading the illusory fear that Islamic laws and customs (also known as Shariah) are taking over American courts." Fazia Patel & Amos Toh, *Commentary: The Clear Anti-Muslim Bias Behind Anti-Shariah Laws*, Wash. Post (Feb. 21, 2014), http://www.washingtonpost.com/national/religion/commentary-the-clear-anti-muslim-bias-behind-anti-shariah-laws/2014/02/21/381d7a7a-9b30-11e3-8112-52fdf646027b_story.html; Greg Garrison, *Amendment Banning 'Foreign Law' in Alabama Courts Passes; Will Be Added to Alabama Constitution*, AL.com, (Nov. 04, 2014, 11:40 PM), http://www.al.

These attitudes are also manifest in the employment context. Following the terrorist attacks of September 11, 2001, the Unites States Equal Employment Opportunity Commission ("EEOC") saw a "250% increase in the number of religion-based discrimination charges involving Muslims." *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, Equal Employment Opportunity Comm'n, http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm (last visited Dec. 2, 2014). Since then, the number of such charges involving Muslims has only grown. *Id.*

As these statistics show, Muslims are one of the most disfavored religious groups in the United States. It is for this reason that the courts must be particularly vigilant in ensuring that employment practices that tend to discriminate against the Muslim community are acknowledged as such, and forthrightly addressed. This is particularly the case in view of the serious emotional, psychological, and economic impacts of such discrimination.

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com/news/index.ssf/2014/11/amendment_banning_foreign_law.html.

A. Discrimination Has Numerous Adverse Effects Upon Individuals' Mental Health.

Extensive social science research has borne out that being subjected to bias on account of one's protected status or its traits and characteristics can lead to higher levels of anxiety and depression, and decreased self-esteem and overall psychological well-being. *See* Michael T. Schmitt et al., *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 Psychol. Bull. 921 (2014) (synthesizing results from previous studies and finding that discrimination has a statistically significant, negative impact upon well-being). This study concluded that people are more likely to consider discrimination "pervasive" when they encounter it and have to justify it across a variety of social contexts. *Id.* at 935. When people perceive discrimination as pervasive, their psychological well-being decreases. *Id.* This effect on well-being appears to be harsher among disadvantaged groups than among groups with higher social status. *Id.*

Those who are regularly discriminated against, for example, have higher levels of anxiety and depression. In one study, a post-September 11th group of Arab Americans completed a series of questionnaires related to cultural assimilation, mental health, and social support. Mona Amer & Joseph Hovey, *Anxiety & Depression in a Post-*

September 11 Sample of Arabs in the USA, 47 Soc. Psychiatry & Psychiatric Epidemiology 409, 411 (2012). The results showed that one-fourth of the participants reported moderate or severe anxiety, while one-half reported depression, both at rates significantly higher than the levels reported by the population at-large. *Id.* at 413.

Similarly, individuals who feel they have been discriminated against not only experience lower self-esteem, but also perceive that they have less control over outcomes and events. *See* Maykel Verkuyten, *Perceived Discrimination and Self-Esteem Among Ethnic Minority Adolescents*, 138 J. Soc. Psychol. 479, 491 (1998). In this study, participants completed questionnaires that asked them about their self-esteem, to what extent they felt personally discriminated against, and how often they experienced subtle acts such as name-calling. The researchers determined that participants who perceived more discrimination—either subtle or overt—had lower self-esteem than those who did not perceive that they had been discriminated against. *Id.* at 483-91.

Threats to one's religious identity, in particular, can lead to increased sadness. *See* Renate Ysseldyk et al., *Coping With Identity Threat: The Role of Religious Orientation & Implications for Emotions & Action Intentions*, 3 Psychol. Religion & Spirituality 132 (2011). In this study, people who self-identified as belonging to a religious group received information intentionally designed to

threaten their religion. *Id.* at 136. Researchers presented the participants with fictitious survey results filled with insults about their religious group. *Id.* The participants were also informed that, as a result of the survey, the government would decrease its funding to that particular religious group. *Id.* Researchers found that when they threatened the participants' religion in this way, the participants experienced greater sadness and anger. *Id.* at 138.

In the workplace, the effects of discrimination can be particularly acute. As one scholar has stated, the workplace has emerged as the "single most important site of cooperative interaction and sociability among adult citizens outside the family." Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 3 (2000); *see also* Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 Colum. J.L. & Soc. Probs. 347, 359-363 (2007) (observing the primacy of workplaces and noting that employment discrimination can result in individuals feeling like they are less than full citizens). As such, discrimination—whether in the form of biased workplace policies or biased behavior, such as decreased eye contact, terse interpersonal interactions, and rudeness—has an adverse effect on job satisfaction and employee turnover. When employees feel they must suppress their identity in their workplaces, their perceptions of discrimination

increase and their job satisfaction decreases.[5] Juan M. Madera et al., *Bringing Social Identity to Work: The Influence of Manifestation & Suppression on Perceived Discrimination, Job Satisfaction, & Turnover Intentions*, 18 Cultural Diversity and Ethnic Minority Psychol. 165, 168 (2012). Research also suggests that such discrimination may lead individuals to forgo opportunities and to avoid situations in which they might expose themselves to further stereotyping. *See* Elizabeth Pinel, *Stigma Consciousness: The Psychological Legacy of Social Stereotypes*, 76 J. Personality & Soc. Psychol. 114 (1999). One study found that in a competitive "Jeopardy"-type game scenario, people who expected to be stereotyped by their opponent avoided categories of questions that could confirm any negative or stereotypical views that the opponent might hold. For example, women avoided topics like "automobile names" and "the military." *Id.* at 125. Extended to the employment context, these results suggest that employees who face discrimination may forego opportunities for professional advancement solely because of fears that their performance would confirm negative stereotypes and biases. This necessarily places them at a disadvantage relative to their coworkers who do not face discrimination and

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[5] These effects are also present when discrimination is subtle, and research has shown that minor, everyday discrimination is pervasive in the employment context. *See* Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 Human Relations 1299 (2003).

who, consequently, do not avoid opportunities for professional growth for those reasons.

Recent findings indicate that religious discrimination in the workplace is widespread. One survey, in fact, found that fully a third of all respondents had either witnessed incidents of religious bias or been confronted with such bias themselves. *See* Tanenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey Of American Workers & Religion* 5 (2013), http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf (last visited Dec. 3, 2014). In light of the documented harms of discrimination upon mental well-being, the prevalence of religious bias in the workplace is deeply troubling.

B. Discrimination Has Particularly Harsh Impacts Upon Muslim Americans.

Researchers who have studied the psychological health of Arab American communities in the United States have found that they experience greater anxiety and depression as compared to other racial or ethnic groups. *See* Amer & Hovey, *supra*, at 413. The stressors Arab Americans face "are uniquely compounded by the heightened and ongoing pressures directed against Arab Americans, especially Muslims. Examples include profiling, discrimination, and biased anti-Arab media.

[S]uch experiences of perceived hostility and discrimination were associated with greater psychological distress." *Id.* at 415. These effects appear to be particularly marked for Muslim immigrants because "they have been traditionally subjected to much higher levels of discrimination than other racial/ethnic groups." Azadeh Ghaffari & Ayşe Çiftçi, *Religiosity and Self-Esteem of Muslim Immigrants to the United States: The Moderating Role of Perceived Discrimination*, 20 Int'l J. for Psychol. Religion 14, 15 (2010). For Muslim men, "the greater the perception of a discriminatory and hostile environment, the greater the amount of suspicion, mistrust, and wariness" that Muslim men feel towards others. Alyssa E. Rippy & Alana Newman, *Perceived Religious Discrimination and Its Relationship to Anxiety and Paranoia Among Muslim-Americans*, 1 J. Muslim Mental Health 5, 15 (2006).

Muslim women are at an increased risk of discrimination-related depression and anxiety. Dena Hassouneh & Anahid Kulwicki, *Mental Health, Discrimination, and Trauma in Arab Muslim Women Living in the US: A Pilot Study*, 10 Mental Health, Religion, & Culture 257 (2007). One study found that 63% of Muslim women reported increased discrimination following September 11th. *Id.* at 260. The types of discrimination reported varied: 10% had been hit or handled roughly; 53% had been called names or insulted; 67% experienced rude treatment; 57% experienced unfair treatment; 27% were either

refused service or experienced delays in service in a store or restaurant; 33% had been excluded or ignored by members of other groups at least one time; and 50% reported discrimination against a family member. *Id.* Most importantly, 77% experienced distress "sometimes or most of the time during incidents of discrimination," a clear indicator of the negative impacts upon their psychological well-being. *Id.* at 260-61.

Studies assessing discrimination against Arabs and Muslims in the employment context have documented the presence of substantially biased attitudes against them. Two studies conducted by the University of Connecticut found that résumés which in any way indicated that the potential applicant was Muslim received the fewest responses from employers. Bradley R. E. Wright et al., *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 Research in Social Stratification and Mobility 111 (2013) ("Muslim applicants received one-third fewer responses from employers, either as phone calls or e-mails, than did the control group."); Michael Wallace et al., *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1 Soc. Currents 189 (2014) ("In general, Muslims, pagans, and atheists suffered the highest levels of discriminatory treatment from employers, a fictitious religious group and Catholics experienced moderate levels, evangelical Christians encountered little, and Jews received no discernible discrimination."). A

similar study revealed that 1.89% of Arab job applicants received callbacks for an interview, compared to a figure of 5.28% for white applicants who used similar résumés. Daniel Widner & Stephen Chicoine, *It's All in the Name: Employment Discrimination Against Arab Americans*, 26 Soc. F. 806, 815 (2011). The only difference between the résumés was the names—one résumé had a name associated with Arab ethnicity, while the other had a name associated with white ethnicity. *Id.* at 809. Prior to using the names, the researchers used an independent study to confirm that people who encountered the names associated them with either Arabs or whites. *Id.* at 813.

C. Religious Discrimination May Have Serious Implications for the Mental Health of Muslim Women Who Wear a Hijab.

Research confirms that the decision to wear a hijab is a deeply personal one that impacts an individual's sense of identity. *See* Nick Hopkins & Ronni Michelle Greenwood, *Hijab, Visibility and the Performance of Identity*, 43 Eur. J. Soc. Psychol. 438 (2013). As one study found, "wearing hijab could be bound up with wishing to make one's [religious] identity visible," which "could be associated with ambitions to exert control over one's categorisation." *Id.* at 442. Thus, wearing the hijab may be a response "to living as young women in a nexus between two cultures and as members of a minority

faith." Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 Soc. Religion 269, 285 (2007).

Despite the central role of hijab in defining religious identity, women wearing it experience discrimination in hiring. One study found that women who requested job applications while wearing a hijab received fewer applications and call backs, experienced shorter interactions, and perceived less interest from prospective employers than when they did not wear a hijab. Sonia Ghumman & Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, 66 Hum. Relations 671, 688 (2013). Similarly, hijabis in a separate study reported that they "felt uncomfortable wearing hijab in the workplace."[6] Terrie C. Reeves et al., *Muslim Women's Workplace Experiences: Implications for Strategic Diversity Initiatives*, 32 Equality, Diversity, & Inclusion: Int'l J. 49, 60 (2012). This discomfort and discrimination may cause hijabis to suppress their religious identity. *See* Madera et al., *supra*. As previous studies confirm, suppression of group identity may lead not only to the mental health harms discussed above, but may

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[6] Studies have shown that formal and interpersonal discrimination leads hijabis to experience lower expectations of receiving a job offer. This is particularly true for jobs that involve high public contact, as opposed to low public contact. *See* Sonia Ghumman & Linda Jackson, *The Downside of Religious Attire: The Muslim Headscarf and Expectations of Obtaining Employment*, 31 J. Organizational Behav. 4, 17 (2010).

also have injurious effects on job satisfaction and lead people to seek new employment, thereby increasing job turnover rates. *See id.* at 168.

D. Discrimination Has Economic Effects.

The detrimental effects of discrimination are not limited to the person who is discriminated against. Employment discrimination also has detrimental effects on the economy. For example, the hostile work environment caused by discrimination against gay and transgender persons alone has been estimated to cost companies $1.4 billion in lost output every year, suggesting that the cost of discrimination as a whole far exceeds $1.4 billion. Crosby Burns, *The Costly Business of Discrimination, The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 3, 13 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf (last visited Dec. 3, 2014).

Additionally, high turnover costs businesses money—when employees resign, companies lose the investment they made in that employee. *Id.* at 11. They also spend anywhere between $5,000 and $10,000 to replace an hourly worker. *Id.* For salaried employees, this amount is even higher—estimates show that turnover costs the employer "1.5 times the total annual compensation of the employee lost, primarily due to recruiting and training." Level

Playing Field Institute ("LPFI"), *The Corporate Leavers Study: The Cost of Employee Turnover Due Solely to Workplace Unfairness* 18 (2007), http://www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf (last visited Dec. 3, 2014). Thus, the cost of replacing a professional is approximately $146,516. *Id.*

CONCLUSION

Amicus curiae Umme-Hani Khan respectfully requests that the Court remain cognizant of the individual and social harms that will result if the employment practices at issue here are found permissible despite Title VII's prohibitions against religious discrimination in the workplace.

Respectfully submitted,

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December 9, 2014